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Nos. 06-1039 & 06-1204

FILED

NOV 13 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ESTATE OF ROGER ROXAS, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

REPUBLIC OF THE PHILIPPINES, *et al.*,

Petitioners,

v.

MARIANO J. PIMENTEL, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

ROBERT A. SWIFT*
KOHN, SWIFT, & GRAF, P.C.
One South Broad Street,
Suite 2100
Philadelphia, PA 19107
(215) 238-1700

JON M. VAN DYKE
2515 Dole Street
Honolulu, HI 96822
(808) 956-8509

SHERRY P. BRODER
841 Bishop Street, Suite 800
Honolulu, HI 96813
(808) 531-8411

Counsel for Respondent Mariano J. Pimentel
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUPPLEMENTAL BRIEF IN OPPOSITION

Respondent Mariano Pimentel and the Class of 9,539 Filipino human rights victims submit this Supplemental Opposition Brief pursuant to Supreme Court Rule 15.8 to respond to the Statement of Interest of the Solicitor General and to bring new authority to the attention of the Court. The Solicitor General opines that United States courts should abdicate jurisdiction over assets in the United States in virtually all cases when a foreign sovereign asserts a claim to those assets and also claims sovereign immunity. Because this position is (1) contrary to Rule 19(b) and (2) unsupported by any precedent in our jurisprudence, and because (3) the opinion of the court of appeals in this case followed directly the roadmap established by this Court in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968), and is not contrary to the holdings of any other Circuit, this Court should deny certiorari.

REASONS FOR DENYING THE PETITION

I. THE DISCRETION COMMITTED TO THE LOWER COURTS BY RULE 19(b) IS NOT ABUSED SIMPLY BECAUSE THE SOLICITOR GENERAL'S ANALYSIS OF CERTAIN FACTORS DIFFERS FROM THE LOWER COURTS' THOUGHTFUL AND THOROUGH ANALYSIS

Rule 19(b) commits to the lower court's "equity and good conscience" the decision whether a party is

indispensable to the litigation. This is the broadest standard of discretion accorded a lower court by the Federal Rules of Civil Procedure. So long as the lower court considered the relevant criteria and balanced the equities – which occurred multiple times by 27 jurists during the history of this litigation – its decision should not be overturned by a reweighing of the equities. Indeed, the Solicitor General's undue emphasis on one party's foreign government status "exemplifies" the "inflexible approach" "that the Rule was designed to avoid." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 107 (1968).

Read as a whole, the Solicitor General simply quarrels with the court of appeal's analysis of the Rule 19(b) criteria, and makes no claim that the court failed to consider and balance all factors. That the Solicitor General finds the extent of prejudice to the missing party greater, or places less emphasis on the lack of an alternative forum or prejudice to the Class, or discounts the impact to Merrill Lynch from dismissal of the interpleader, or speculates that a United States court might enforce a future foreign judgment contrary to an earlier domestic court judgment, or approves the meddling of a foreign sovereign in the work of the courts, provides no basis to overturn the lowers court's thoughtful and thorough analysis. Nor does it approach the heavier showing required after completion of trial to overturn a Rule 19(b) ruling:

> [The] interest in preserving a fully litigated judgment should be overborne only by rather

> greater opposing considerations than would be required at an earlier stage . . .

Provident Bank & Trust Co. v. Patterson, *supra*, 390 U.S. at 112. Rule 19(b)'s criteria are not exclusive and there are other factors the Solicitor General politely overlooks. The Solicitor General's analysis fails to mention: the Republic's lack of comity and its absence of respect for the United States courts it has heavily utilized to recover Marcos assets, the Republic's own responsibility for its strategic choice to assert sovereign immunity,[1] or the legal obligations the United States owes human rights victims to provide a forum for their claims pursuant to international treaties to which it is a party. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85, art. 14 ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress

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[1] As the lower court found (ROP 58a-59a):

> The Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets. "An absent party's opportunity to intervene may be considered in calculating the prejudicial effect to him." *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 820 n.5 (9th Cir. 1985). The Republic and PCGG must accept "the disadvantages as well as the advantages that flow from" their "strategic election." *Citibank International v. Collier Traino Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987).

and has an enforceable right to fair and adequate compensation . . . ").

II. THE SOLICITOR GENERAL'S APPROACH WOULD EMASCULATE THE ARTICLE III DUTY OF U.S. COURTS TO ADJUDICATE ENTITLEMENT TO ASSETS LONG HELD IN THE UNITED STATES

The Solicitor General urges that if a foreign sovereign claims assets located on American soil and also asserts sovereign immunity, United States courts must abdicate their constitutional duty to adjudicate title to the assets in virtually all cases and surrender their jurisdiction to a foreign court. In this case, the lower court held that it possessed *in rem* jurisdiction pursuant to 28 U.S.C. §1655 over the assets, in addition to interpleader jurisdiction.[2] ROP 50a. The lower court's assertion of *in rem* jurisdiction was not challenged on appeal or in this Court. This Court has never lowered the flag of American court jurisdiction over *in rem* actions. *See, e.g., Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (state sovereign immunity not a bar to bankruptcy jurisdiction since bankruptcy is similar to an *in rem* action). Applying the reasoning of *Katz*, interpleader

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[2] The United States, at page 9 n.3 of its brief, incorrectly attempts to distinguish this case from other Supreme Court precedent on the ground there was *in rem* jurisdiction over the assets at issue in the other cases but not the instant case.

jurisdiction involves adjudication of entitlement to a *res* and a discharge decree.

The Rule 19(b) issue for which the Solicitor General advocates certiorari is *sui generis*. Never before has a foreign sovereign asserted its immunity to preclude, under Rule 19(b)'s indispensability criteria, a federal court from adjudicating entitlement to assets over which a United States court has both interpleader and *in rem* jurisdiction. Moreover, this action does not involve transitory assets located in the United States for a short time. The assets at issue have been on deposit in the United States for over three decades and in the custody of a federal court for seven years.

Although the Solicitor General asserts that the decision of the lower court conflicts with Rule 19(b) precedent in this Court and other circuits, it fails to cite a single case involving a foreign sovereign. The cases cited involve American political entities or Indian tribes, and in each case there were alternative methods of resolving the dispute within the United States. For example, in the case of Indian tribes, Congress could legislate a solution to the disputes. By contrast, there is no political or litigation alternative to the instant interpleader action.

The Solicitor General's position raises a more troubling issue. If a foreign sovereign can oust U.S. courts of Article III jurisdiction by simply claiming – without proof – assets located in the United States, this power could be asserted and abused by regimes hostile to the United States. Such a doctrine would

eviscerate the proper role of the courts to adjudicate disputes regarding assets in the United States.

III. THIS COURT SHOULD RESIST MANIPULATION OF COURT PROCEDURES BY FOREIGN GOVERNMENTS

Although the Republic of the Philippines has known of the existence of the Arelma account at Merrill Lynch since at least 1986 (when it had a federal court freeze the account), the Republic never sought judicial relief in the Philippines or in the United States as to that account until July 2004 – four days after judgment was rendered for Pimentel and the Class in the lower court. By seeking relief in a Philippine court, the Republic hoped to nullify the American judgment.[3] The Republic participated in the lower court proceedings in this case indirectly through other parties – Philippine National Bank and Arelma – both of which it controlled and paid legal fees for.[4] Those parties were proxies for the Republic,

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[3] The July 15, 2003 decision of the Philippine Supreme Court forfeiting the Swiss bank accounts made no mention of the Arelma funds on deposit with the United States court in Hawaii since the Republic never sought any relief as to those funds. *See* ROP 56a. The Republic's motion, pending in a lower Philippine court, seeks to reopen the Philippine Supreme Court decision which the latter Court had expressly declared final and executory.

[4] The Republic of the Philippines owns 16% of the outstanding stock of Philippine National Bank ("PNB") and elects 4 of its 11 directors. Zenorosa Dep. at 9-12. The Republic is party to an escrow agreement with PNB whereby PNB acts on behalf

(Continued on following page)

claimed the assets, and participated in every phase of the litigation. The inescapable conclusion is that when these parties lost in the lower court, nullification was the only alternative.

The Republic has utilized American courts extensively for the recovery of Marcos assets. Since 1986, it filed, or was party in, over a dozen legal proceedings involving alleged Marcos assets, including an interpleader proceeding. *See Republic of the Philippines v. Christie's*, No. 98-3871 (S.D.N.Y. 1998). It never once asserted its sovereign immunity. The assertion of sovereign immunity now is simply an attempt to manipulate this Court. Should the Republic eventually obtain a judgment of forfeiture as to the assets of Arelma in Philippine courts, it may fully satisfy that judgment from the substantial Marcos assets still under sequestration in the Philippines.

The Republic never sought the assistance of the United States under the Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT"), Nov. 13, 1994, U.S.-Phil., S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1995) – and never mentioned the Treaty in lower court proceedings. Because private parties have no standing in a forfeiture proceeding in the Philippines, its citation now by the Solicitor General is a red herring. *See* ROP 41a. Thus, any forfeiture judgment obtained by the Republic as to the assets would

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of the Republic, at the Republic's expense and at the Republic's instructions regarding Arelma. *Id.*

not be eligible for recognition by a United States court under MLAT since Pimentel and the Class, with an interest in the assets, are barred from the proceeding. *See* 28 U.S.C. §2467(C); ROP 59a. Indeed, the Republic never sought to join Pimentel and the Class to the July 2004 forfeiture proceeding.

Indicative of the Republic's motives in this action is the recent decision by the United Nations Human Rights Committee ("HRC") finding that the Republic violated the rights of Pimentel and the Class under international law. *See Pimentel v. The Philippines*, No. 1320/2004 (Mar. 19, 2007).[5] The HRC found a violation of the United Nations Optional Protocol to the Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 14, 23 I.L.M. 1027 (1984), *modified*, 24 I.L.M. 535 (1985) by virtue of the Philippine court's dismissal of an action in Philippine courts to enforce the Class's 1995 United States judgment against the Marcos Estate for failure to pay a filing fee of $8.4 million, and the subsequent delay of 8 years and 3 months in overturning that decision.

> The Committee is of the view that the authors [the Class] are entitled, under article 2, paragraph 3(a), of the Covenant, to an effective

[5] The decision was not communicated to counsel for Pimentel until after submission of Pimentel's initial Opposition Brief to this Court.

> remedy. The State party is under an obligation to ensure an adequate remedy to the authors including, compensation and a prompt resolution of their case on the enforcement of the US judgment in the State party.

Id. at pp. 7-8.

The Republic's current position is diametrically opposite to its official position at the beginning of this human rights litigation, when the Republic represented to the court of appeals in an *amicus curiae* brief that the "U.S. courts should adjudicate the Human Rights Victims' claim against Marcos" and that "foreign relations with the United States will **not** be adversely affected if these human rights claims against Ferdinand Marcos are heard in U.S. courts." *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1472 (9th Cir. 1994) (quoting from the Republic's *amicus curiae* brief; emphasis in the original brief).

The diplomatic note of the Swiss Federation which objected to the underlying judgment in favor of Pimentel and the Class is no less manipulative. Switzerland had *in rem* jurisdiction over the Arelma share certificates which it transferred to the Republic. The United States courts never interfered in any way with the share certificates or adjudicated entitlement to them. However, Switzerland never had control or jurisdiction over the assets in the Arelma account at Merrill Lynch which, since the account was opened in 1972, have been in the United States. Switzerland's assertion of jurisdiction over the Arelma

assets in the United States is nothing short of a frontal attack on this Court's decision in *Dole Food v. Patrickson*, 538 U.S. 468 (2003), which held that a stockholder does not own or control the assets of the corporation.

The Swiss Federation's position is contrary to the decisions of its own Supreme Court which permitted the return to the Philippines of Marcos funds located in Switzerland. *See In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.91/1997/odi, at A16 (Dec. 19, 1997) and *In the Matter of The Swiss Federal Office of Police Matters v. Fondation Maler et al.*, 1A.101/1997/zus, at C19 (Jan. 7, 1998).[6] In these decisions, the Swiss Federal Court explicitly conditioned return of the funds on the Republic's compensation of Filipino human rights victims, referring explicitly to the judgment for the human rights victims in the case underlying the present attempt to enforce a judgment. As the court of appeals pointed out, the human rights victims have never been compensated. *See* ROP 9a-10a.

CONCLUSION

This Court should resist the manipulations of the Republic, whose objective is to preclude compensation to its own abused citizens despite a judgment

[6] These decisions were trial exhibits and reproduced in the appellate court record.

rendered in a United States court. The Ninth Circuit followed the dictates of Rule 19(b) and the roadmap laid down in *Provident Tradesmens Bank & Trust, supra,* in considering and balancing the equities as to whether the litigation should be dismissed for lack of a necessary party, paying due attention to the Republic's status as a foreign government entitled to immunity. Rule 19(b) demands no more and accords the court of appeal's decision great latitude.

Accordingly, the petitions for a writ of certiorari should be denied to enable the interpleaded assets to be distributed to the Class of Filipino Human Rights Victims in partial satisfaction of their judgment against the Estate of Ferdinand E. Marcos.

Respectfully submitted,

ROBERT A. SWIFT*
KOHN, SWIFT, & GRAF, P.C.
One South Broad Street,
Suite 2100
Philadelphia, PA 19107
(215) 238-1700

JON M. VAN DYKE
2515 Dole Street
Honolulu, HI 96822
(808) 956-8509

SHERRY P. BRODER
841 Bishop Street, Suite 800
Honolulu, HI 96813
(808) 531-8411

Counsel for Respondent Mariano J. Pimentel
**Counsel of Record*